No. 77-5992

In the Supreme Court of the United States

October Term, 1977

FRANK O'NEAL ADDINGTON,
Appellant,

vs.

THE STATE OF TEXAS,
Appellee.

Appeal From the Judgment of the Supreme Court of the State of Texas

BRIEF OF THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The National Center for Law and the Handicapped was established in July, 1972, to advocate for the legal rights of all handicapped individuals through the provision of legal assistance, legal and social science research activities, and programs and processes of education and professional awareness.

The Center is jointly funded by the Bureau of Education for the Handicapped, Office of Education, and as a project of national significance by the Developmental Disabilities Office, Office of Human Development, of the United States Department of Health, Education, and Welfare. The Center's sponsoring agencies are the National Association for Retarded Citizens, the Family Law Division of the American Bar Association, the University of Notre Dame School of Law, and the Council for the Retarded of St. Joseph County (Indiana).

Assistance for disabled individuals is provided through direct legal intervention in selected cases and indirectly through consultation with attorneys, organizations, and individuals considering or involved in litigation. The Center has been admitted in numerous court cases, serving primarily in the role of *amicus curiae*.

The legal and social science staff also provides assistance to attorneys, legislators and various organizations working in areas involving the disabled through consultation, legal research and the drafting of model pleadings and briefs.

Research activities of the legal and social science staff are broad-based and multi-disciplinary in nature. They have been designed to facilitate legal reform and to allow a fuller realization of the legal rights of the handicapped.

Amicus has received consent from both appellant and appellee to file this brief. Their consents are on file with the Clerk of the Supreme Court.

QUESTION PRESENTED BY AMICUS

Whether a state, in depriving an allegedly mentally ill individual of his fundamental right to liberty through a process of involuntary civil commitment for an indefinite

period of time, may permissibly, pursuant to the Due Process Clause of the Fourteenth Amendment, apply a standard of proof less stringent than "beyond a reasonable doubt?"

STATEMENT OF THE CASE

Frank Addington was civilly committed to a psychiatric hospital for an indefinite period of time after a jury determined that he was mentally ill and that he required hospitalization in a mental hospital for his own welfare and protection or the protection of others. The trial court applied a standard of proof of "clear, unequivocal and convincing evidence."

Relying upon the decision of its sister court in *Turner* v. *State,* 542 S.W.2d 453 (Tex. Ct. App. 1976), the Texas Court of Civil Appeals reversed this decision, holding that the standard of proof of "beyond a reasonable doubt" is required in such proceedings. However, the Texas Supreme Court reversed the decision of the court of civil appeals, relying on its decision in *State* v. *Turner,* 556 S.W.2d 563 (1977).

In *State* v. *Turner,* the Texas Supreme Court adopted a standard of proof of preponderance of the evidence, relying on three basic distinctions between civil and criminal proceedings to justify a less stringent standard than that applied in criminal prosecutions. First, the court reasoned that the patient, although committed for an indefinite period of time, had a right to treatment, to periodic review, and to be released when no longer found to be a danger to self or others. Second, the court distinguished the need to make a determination of future conduct in a civil commitment from the assessment of past conduct which is made in a criminal case. Finally, the court justified

the lower standard by the rationale that psychiatry is not an exact medical science.

Frank Addington appealed the decision of the Texas Supreme Court and the United States Supreme Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

The standard of proof required by due process in involuntary civil commitments must be determined by balancing the interests of the individual against the interests of the state. In Part I of this brief, *Amicus* argues that the individual's interest in liberty, when balanced against the state's decreasing interest in involuntary hospitalization, requires the utilization of a standard of proof greater than a mere preponderance of the evidence.

Until the middle of the nineteenth century, mentally ill persons were treated harshly, and they were often indiscriminately mixed with paupers and criminals. A reform movement aimed at providing treatment to individuals with mental illness led to the construction of massive, isolated mental hospitals during the latter half of the nineteenth century. Soon after, however, the focus of these institutions shifted to custody rather than treatment.

Until two decades ago, these institutions provided the only mechanism whereby the state could attempt to achieve its interests in protecting mentally ill individuals or in protecting society. However, in the past two decades, community-based residental and treatment services have been developed as an alternative to institutionalization on an extremely large scale. In addition, the available treatment is increasingly being sought on a voluntary basis by individuals who are mentally ill.

Thus, *amicus* contends that the state's need to involuntarily deprive an individual of his or her liberty in order to achieve its interests has been greatly diminished. The state's interests can be, and are being, achieved through other methods.

In analyzing the individual's fundamental interest in liberty, *amicus* argues that this interest is seriously abridged by involuntary civil commitment. *Amicus* cites the recognition which the Court has previously given to the deprivation of liberty which results from civil commitment and argues that the liberty interest in civil commitment is as important as the liberty interest presented in juvenile hearings and "mentally disordered sexual offender" cases, in which the Court has applied a reasonable doubt standard. In addition, *amicus* demonstrates that the liberty interest at issue in civil commitment is at least as important as the numerous individual's interests at stake in denaturalization and deportation proceedings, in which the Court has required that the evidence meet a standard of proof of clear and convincing evidence. *Amicus* asserts that the preponderance of the evidence standard applied in many routine civil matters is insufficient to constitutionally protect the individual's overriding right to liberty.

In Part II of this brief, *amicus* discusses the inexact nature of psychiatric "diagnoses" and the role of psychiatric evidence in the civil commitment process. The relevant literature is first reviewed to show that psychiatrists cannot reliably determine the threshold issues of whether an individual is mentally ill or whether an individual is in need of care and treatment. The relevant literature is then reviewed to show the inaccuracy of psychiatric predictions of future dangerousness.

Amicus illustrates that neither a reasonable doubt standard nor a clear and convincing standard can be realistically achieved by total reliance upon psychiatric evidence. *Amicus* urges that the standard of proof not be weakened merely because the civil commitment statutes define elements of proof which are too inexact to be reliably proven. It is suggested that by adopting elements of proof which are subject to objective consideration, the state's interest can be fulfilled without compromising the individual's liberty interest. Hence, *amicus* argues that the reasonable doubt standard is constitutionally required in civil commitment proceedings.

In Part III of this brief, *amicus* calls the Court's attention to the far-reaching implications of their decision. *Amicus* argues that the standard of proof required does substantially affect the ultimate determination of the trier of fact. *Amicus* then discusses the abuses which have resulted from the traditional informality in civil commitment hearings. *Amicus* asserts that the Court's decision on the standard of proof issue will have substantial impact upon the legislative trend to formalize commitment proceedings in a manner consistent with the liberty interests at stake.

Finally, *amicus* examines the evolving social policy of providing community care and treatment to other classes of handicapped individuals. While the case at Bar addresses the standard of proof in proceedings to civilly commit mentally ill individuals, the Court's decision will ultimately affect the processes for committing other handicapped individuals.

Amicus asserts that only by applying a reasonable doubt standard of proof can a recurrence of the past social practices of routinely isolating handicapped persons in massive institutions be prevented.

ARGUMENT

I.

BALANCING THE STATE'S DECREASING INTEREST IN INVOLUNTARY HOSPITALIZATION WITH THE INDIVIDUAL'S FUNDAMENTAL INTEREST IN LIBERTY REQUIRES A STANDARD OF PROOF GREATER THAN A MERE PREPONDERANCE OF THE EVIDENCE.

Due process is not a fixed concept; its requirements vary depending on the various interests involved in a given situation. Due process commands a balancing approach which weighs the relative importance of competing interests.

> [D]ue process is flexible and calls for such procedural protections as the particular situation demands. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

Morrissey v. *Brewer,* 408 U.S. 471, 481 (1972) (citations omitted).

The standard of proof dictated by procedural due process will reflect the comparison of the interests of the individual with the interests of the state. In civil commitment proceedings the individual's interest is a fundamental interest in liberty. The state's interest asserts the parens patriae rationale of protecting mentally ill individuals and the police power rationale of protecting society. In recent years, the state's interest in civil commitment has been decreasing,

while the individual's liberty interest, in a variety of contexts, has been increasingly strengthened by the judiciary through due process restrictions upon state-sponsored deprivations of liberty.

A. The State's Interest in Involuntary Hospitalization Has Decreased Over the Past Two Decades.

1. *The State's Interest in Involuntary Hospitalization Developed Historically Because of the Lack of Alternatives to Institutional Care.* The sources of the state's power to commit mentally ill individuals derive from our Anglo-American political system.[1] The state's power is exercised under the parens patriae power to protect the individual and under the police power to protect the public. For centuries, mentally ill persons were not treated as members of a distinct class; rather, if nonviolent and indigent, they were lumped with other paupers who received "protective" treatment under parens patriae notions and, if violent, they were processed as criminals under the police power.[2]

Prior to the mid-nineteenth century, mentally ill individuals experienced social treatment which included being: exorcised to drive out evil spirits, hung as witches, chained in cages and kennels with regular whippings, auctioned off as paupers, and incarcerated in prisons and almhouses.[3] Beginning in about 1830, the general belief in the incurability of mental illness shifted to an optimistic

[1] Kittrie, The Right to Be Different 58 (7971) (hereinafter cited as Kittrie).

[2] *Id.* at 62.

[3] Deutsch, The Mentally Ill in America 517 (1949) (hereinafter cited as Deutsch).

view of the curability of all mentally ill persons.[4] In the 1840's and the 1850's, the crusading work of Dorothea Dix to improve conditions for mentally ill persons in poorhouses combined with the new focus on curability to generate the first large-scale establishment of institutions specifically designed and operated for the treatment of mentally ill individuals.[5]

These new approaches joined with other contemporary social and economic developments—ranging from the industrial revolution through the altered and increased complexities of social order and relationships to the rapid expansion of population and urbanization—to produce the solution for the problem of mental illness. That solution was to gather all mentally ill people together and confine them in institutions, isolated from society in rural areas.[6]

With the rapid construction of mental hospitals came the need for involuntary commitment procedures. As civil commitment laws were legislatively adopted during the mid-nineteenth century, they initially sought to protect only the societal concerns. These statutes constructed very informal procedures designed to favor administrative ease, and they were almost void of concern for the individual's personal rights.[7]

[4] *Id.* at 132; Rock, Jacobson & Janopaul, Hospitalization and Discharge of the Mentally Ill 12 (1968) (hereinafter cited as Rock, Jacobson & Janopaul).

[5] Deutsch, *supra* note 3, at 159. The institutional model grew out of the framework of workhouses and public hospitals. Kittrie, *supra* note 1, at 61.

[6] Deutsch, *supra* note 3, at 186-87.

[7] Curran, *Hospitalization of the Mentally Ill,* 31 N. Car. L. Rev. 274, 275 (1953) (hereinafter cited as Curran); Rock Jacobson & Janopaul, *supra* note 4, at 14-16. Interestingly, the early procedural rules existed not to prevent improper commitment but to keep out paupers and vagabonds who might desire the perceived benefits of the institution. Kittrie, *supra* note 1, at 64.

In the 1860's Dorothy Packard started a crusade to arouse public concern and eliminate the "railroading" of individuals into asylums after her release from an Illinois mental hospital.[8] Her exposures resulted in many states introducing formal guarantees of minimal due process in the involuntary commitment process.[9]

However, by the last quarter of the nineteenth century, the failure of mental hospitals to "cure" a significant portion of their mental patients caused public disillusionment and a period of reaction, spurring a new cycle of institutional neglect.[10] Institutions grew larger and focused mainly on custody rather than treatment; the Depression of the 1930's and the Second World War exacerbated the problems.[11]

This approach continued undaunted until the past two decades. For approximately one hundred years many doctors prescribed hospitalization as "the only acceptable form of treatment for the mentally ill."[12]

Until the mid-1950's, institutionalization was viewed as the only available means of insuring the state's interest of protecting society. However, with the more recent availability of alternatives which entail fewer restrictions upon individual liberty, the state's interest in involuntary confinement to an institutional environment has decreased concomitantly.

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[8] Kittrie, *supra* note 1, at 65; Curran, *supra* note 7, at 275-76.

[9] Kittrie, *supra* note 1, at 65.

[10] Deutsch, *supra* note 3, at 157.

[11] *Id.* at 446-50.

[12] Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1107, 1112 (1972) (hereinafter cited as Chambers).

2. ***The Development of Community-Based Residential and Treatment Services Has Significantly Reduced the State's Reliance upon Involuntary Hospitalization.*** The last two decades have witnessed a significant decrease in the resident population of public mental hospitals.[13] The ill-fated development of mental institutions was

> a movement begun by Dorothea Dix that started as the hope of the future for the mentally disturbed, and is now ending with hopes shattered and expectations unmet, under the aegis of judicial scrutiny, and with public outcry. The mental hospital, as an institution, is under fire, not for what it has done for the mentally disturbed and ill but what it has not done.[14]

In 1955, the demise of institutionalization as the primary response to societal concerns began with the establishment by Congress of a commission to study the existing mental health programs and facilities in the United States.[15] The commission's report, issued in 1961, urged the rapid development of outpatient clinics and services and a decreased emphasis on inpatient mental hospitals.[16] The late President Kennedy responded by calling for decreasing

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[13] After peaking in 1955 with 559,000 persons institutionalized for mental illness, the numbers decreased to 504,600 in 1963 and to 215,500 in 1974. Comptroller General of the United States, Report to the Congress—Returning the Mentally Disabled to the Community: Government Needs to Do More 8 (1977) (hereinafter cited as Comptroller General Report).

[14] Ahmed & Plog, *Introduction and An Overview of the Closing Scene*, in State Mental Hospitals: What Happens When They Close 3 (Ahmed & Plog, eds. 1976).

[15] The Mental Health Study Act of 1955, ch. 417, § 3, 69 Stat. 382, cited in Chambers, *supra* note 12, at 1114.

[16] Joint Commission on Mental Illness and Health, Action for Mental Health (1961), cited in Chambers, *supra* note 12, at 1115.

by one half the population of mental hospitals; Congress passed the Community Mental Health Centers Construction Act of 1963, 42 U.S.C. § 2689, committing substantial federal funds for the creation of community-based treatment facilities by the states.[17]

The 1950's also marked the development of tranquilizing medication which enabled many patients, who previously had been hospitalized, to be treated in the community.[18] Studies comparing hospital-based treatment to community-based treatment made striking conclusions.

> The hospital as a form of treatment for the severely ill psychiatric patient is always expensive and inefficient, frequently anti-therapeutic, and never the treatment of choice.
>
> There are many studies in the psychiatric literature of the last two decades which report that forms of treatment other than hospitalization are superior in terms of outcome for the severely ill psychiatric patient. . . . In terms of the patients' posttreatment function, need for further treatment, and improvement in symptoms, patients who were not hospitalized always did better than matched patients who were treated in hospitals.[19]

Amicus recognizes that the relative value of community-based alternatives to institutional confinement is not at issue in the case at Bar. However, *amicus* asserts that the existence of widespread community-based alternatives, together with the support given such alternatives by count-

[17] Comptroller General Report, *supra* note 13, at 3.

[18] Chambers, *supra* note 12, at 1117.

[19] Mendel, *The Case for Closing of the Hospitals,* in State Mental Hospitals: What Happens When They Close 21 (Ahmed & Plog eds. 1976).

less mental health professionals and by the federal and state governments, illustrates the reduced reliance currently placed upon the involuntary commitment process. Merely summarizing the existing federal programs highlights the community services available to those mentally ill persons whom the state believes may need care or treatment.

There are at least 135 federal programs, of which 89 are operated by the Department of Health, Education and Welfare, which serve the mentally disabled either directly or indirectly and which fund services for such individuals.[20] In 1963, the Community Mental Health Centers program sought to insure that, whenever possible, mentally ill persons be treated in their own communities.[21] Although this program has accomplished much, in 1974 the Comptroller General reported that the Act's goals had not been effectively achieved.[22] In order to more effectively carry out its original intent, Congress responded by enacting the Special Health Revenue Sharing Act of 1975, 42 U.S.C. § 246,[23]

[20] Comptroller General Report, *supra* note 13, at 5.

[21] See discussion, *supra* note 17 and accompanying text. Several courts have required states to provide appropriate community-based services to eliminate inappropriate hospitalization. *See e.g. J.L. & J.R.* v. *Parham,* 412 F. Supp. 112 (M.D. Ga. 1976), *prob. juris. noted,* 45 U.S.L.W. 3373 (1977), *reargument ordered,* 46 U.S.L.W. 3452 (1978); *Dixon* v. *Weinberger,* 405 F. Supp. 974 (D.D.C. 1975).

[22] Comptroller General Report, *supra* note 13, at 67.

[23] Under this Act, states must establish and implement a plan to eliminate inappropriate institutional placements and to insure the availability of appropriate noninstitutional services. 42 U.S.C. § 246(d)(2)(D)(i)(I).

and the Community Mental Health Centers Amendments of 1975, 42 U.S.C. § 2689.[24]

As of July, 1975, $1.2 billion had been awarded by the National Institute for Mental Health for the construction and staffing of 603 community mental health centers which, when operational, will serve 41 percent of the nation's population.[25] Other federal services which impact upon the availability of community care include Medicaid, Medicare, Supplemental Security Income, Vocational Rehabilitation,[26] Housing Assistance,[27] and Social Services.[28] In addition, a large number of mental health clinics have been established by state and local governments and by private organizations to provide such services as day treatment, medication and psychiatric therapy.[29]

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[24] These amendments include the requirements that the community mental health centers provide transitional halfway house services, 42 U.S.C. § 2689(b)(1)(G), and mental health center treatment, 42 U.S.C. § 2689(b)(1)(A), as alternatives to inhospital treatment.

[25] Comptroller General Report, *supra* note 13, at 68.

[26] The Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., is aimed particularly at efforts to rehabilitate those with severe disabilities.

[27] The Housing and Community Development Act of 1974 requires the consideration of low income, mentally disabled persons in the Department of Housing and Urban Development's housing assistance plans. 42 U.S.C. § 1437a (2).

[28] Under Title XX of the Social Security Act, 42 U.S.C. § 1397, states receive federal funds to provide services aimed at five specific goals, two of which are related to deinstitutionalization. 42 U.S.C. § 1397(1)-(5). For this program, $2.5 billion is available annually to the states. 42 U.S.C. § 1397a (a)(2)(A).

[29] Comptroller General Report, *supra* note 13, at 67.

This array of community-based services bears upon the balancing of interests required to determine the standard of proof which due process mandates in the involuntary commitment process. Twenty years ago, if the state failed in its attempt to involuntarily commit an individual because it could not meet the requisite standard of proof, the individual would have been virtually without community support services. If the state's interest in protecting the individual or society was valid, that interest could have suffered. However, the numerous support services which currently exist in the community operate to minimize any risk that the state's interests will not be fulfilled. The wide availability of community services clearly diminishes the state's interest in civil commitment.

Finally, the increased utilization of voluntary admissions also has influenced the decline in the need for involuntary hospitalization. The persuasive force of family, friends and community service providers has combined with a heightened awareness among mentally ill individuals as to the availability of mental health services to minimize the need for state intervention. By 1972, "it was clear that the pendulum had swung such that voluntary admissions had come to outnumber involuntary, and that swing seems to be continuing."[30] The treatment pattern, with its attendant increase in voluntary care, reduces the risk to the state and consequently decreases the state's interest in involuntary commitment.

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[30] Stone, Mental Health and Law: A System in Transition 43 (1975) (published by the National Institute of Mental Health) (hereinafter cited as Stone). "Current reports suggested that involuntary civil commitment is rapidly declining." *Id.*

B. Involuntary Civil Commitment Seriously Abridges an Individual's Fundamental Interest in Liberty.

1. *The Court Has Previously Recognized the Deprivation of Liberty Which Occurs as a Result of the Commitment Process.* While the Court has never directly ruled on the substantive or procedural requirements which are constitutionally mandated in the civil commitment process, the Court has recognized, in a series of decisions, that the involuntary commitment of an individual involves a serious deprivation of liberty.

In the most recent decision involving an involuntarily committed mental patient, the Court narrowed the issue to an "important question concerning every man's constitutional right to liberty." *O'Connor* v. *Donaldson,* 422 U.S. 563, 573 (1975). The Court held that

> a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.

Id. at 576. In his concurring opinion, Chief Justice Burger emphasized the overriding interest in liberty held by a mentally ill individual who is nondangerous and capable of surviving safely in freedom. *Id.* at 578 (Burger C.J., concurring).[31]

[31] "There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." 422 U.S. at 580 (Burger C.J., concurring). *See also* Chambers, *supra* note 12, at 1158. "It is indeed hard to accept that there can be any 'fundamental personal liberty' . . . more fundamental than personal liberty itself and personal liberty is, of course, what is at risk in its most literal sense for the mentally ill." Among the fundamental interests which Chambers argues are affected by civil commitment are the rights to travel, of free association, to peaceably assemble, to communicate and receive communications, to exercise religious beliefs and to maintain one's privacy, though overriding is the right not to be physically confined.

"Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on [the] power [to involuntarily hospitalize] have not been more frequently litigated." *Jackson* v. *Indiana,* 406 U.S. 715, 737 (1972). In the case at Bar, the Court is asked to decide the requisite standard of proof which the state must meet in order to justify "a massive curtailment of liberty." *Humphrey* v. *Cady,* 405 U.S. 504, 509 (1972).

At stake is an individual's liberty, "an interest of transcending value." *Speiser* v. *Randall,* 357 U.S. 513, 525 (1958). *Amicus* argues that the preservation of that liberty interest requires that a substantial standard of proof be met prior to ordering involuntary hospitalization. A standard which permits commitment upon a mere showing of preponderance of the evidence does not afford sufficient due process protection to the individual's liberty interest.

2. *The Liberty Interest in Civil Commitment Is at Least as Important as the Liberty Interest in Juvenile and "Mentally Disordered Sexual Offender" Cases in Which the Reasonable Doubt Standard Has Been Required.* Judicial proceedings against juveniles historically provided informal standards and procedures, based upon the rationale that the proceedings were civil in nature and based upon an assumed benevolent intent to rehabilitate wayward youth. In numerous respects, the former policies of administration of juvenile justice parallel the current civil commitment practices in many states.

In 1967, the Court looked beyond the asserted reasoning to analyze the effect of the juvenile process upon the individual.

> Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct.

> The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence and limited practical meaning that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours. . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.

In re Gault, 387 U.S. 1, 27 (1967) (footnotes omitted).

Rather than relying upon the labels attached to the procedures, the Court struck to the heart of the matter: commitment means depriving a person of his or her liberty. The Court applied the basic principles of due process to juvenile proceedings, reasoning that

> [t]o hold otherwise would be to disregard substance because of the feeble enticement of the civil label of convenience which has been attached to juvenile proceedings. . . . For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil."

Id. at 49-50.

Three years after *Gault,* the Court considered whether the "essentials of due process and fair treatment" require a reasonable doubt standard of proof in juvenile proceedings. *In re Winship,* 397 U.S. 358, 359 (1970). The Court recognized that the standard of proof is the prime instrument for reducing the risk of convictions based upon factual error and that the juvenile's interests in

avoiding loss of liberty and stigmatization are of immense importance. Drawing upon its earlier reasoning in *Speiser* v. *Randall,* 357 U.S. 513, 525-26 (1958), the *Winship* Court held:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.
>
> . . . .
>
> [U]se of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

397 U.S. at 364.

The lower court had set forth three grounds for not applying the reasonable doubt standard: the process did not result in "convictions;" the adjudication affected no rights or privileges, such as the right to hold public office or obtain a license; and, a cloak of protective confidentiality encompassed all the proceedings. *Id.* at 365. In rejecting this reasoning and applying the reasonable doubt standard, the *Winship* Court referred to *Gault*: "We made clear in that decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts." *Id.* at 365-66.

The *Winship* Court reasoned that the benevolence of the process would not be affected by the application of a strict standard of proof. The reasonable doubt standard was seen as a vehicle to ensure that the benevolent purposes were applied only to those individuals who had actually behaved in a manner warranting governmental intrusion into their lives.[32]

Justice Harlan, concurring in the Court's opinion in *Winship,* performed a careful analysis of the comparative social costs of erroneous factual determinations. He viewed the standard of proof as instructing the factfinder on the necessary degree of confidence in the correctness of the factual conclusions. He also understood that the standard of proof reflects a societal judgment as to the acceptable tolerance of frequency of error.

> In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.
>
> . . . .
>
> In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as

[32] In the civil commitment process, this argument may be even more compelling.

> Given the record of past performance with the tragic parody of legal commitment used to warehouse American citizens, it is equally important that the individual feel sure that the mental health system cannot be so used and abused. Indeed, it may be more important for while the average citizen may have some confidence that if called by the Grand Inquisitor in the middle of the night and charged with a given robbery, he may have an alibi or be able to prove his innocence, he may be far less certain of his capacity, under the press of fear, to instantly prove his sanity. Stone, *supra* note 30, at 57.

> equivalent to the disutility of acquitting someone who is guilty.

Id. at 371-72 (Harlan J., concurring).[33]

While not deciding a standard of proof issue, the Court has addressed issues involving the involuntary commitment of sexual offenders for treatment under statutes which were traditionally labelled "civil." *Specht* v. *Patterson,* 386 U.S. 605 (1967). "These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause." *Id.* at 608. The Court held that full due process must attach in proceedings to determine whether a person constitutes a threat of causing bodily harm to the public or whether a person is an habitual offender and mentally ill. *Id.* at 611.

The United States Court of Appeals for the Seventh Circuit relied upon *Specht* and *Winship* in holding that in-

[33] In *Murel* v. *Baltimore City Criminal Courts,* 407 U.S. 355 (1972), the Court dismissed as improvidently granted a writ of certiorari to the Court of Appeals for the Fourth Circuit. The lower court had upheld a preponderance of the evidence standard for the commitment of "defective delinquents" in *Tippett* v. *Maryland,* 436 F.2d 1153 (4th Cir. 1971). The Court dismissed the writ because Maryland was in the process of rewriting its commitment statutes. Justice Douglas dissented, focusing upon the liberty interests involved.

> When a state moves to deprive an individual of his liberty, incarcerate him indefinitely, or to place him behind bars for what may be the rest of his life, the Federal Constitution requires that it meet a more rigorous burden of proof than that employed by Maryland to commit defective delinquents. . . . Petitioners have thus been taken from their families and deprived of their constitutionally protected liberty under the same standard of proof applicable to run-of-the-mill automobile negligence actions.

Id. at 359 (Douglas J., dissenting).

voluntary commitments under the Illinois Sexually Dangerous Persons Act must apply a reasonable doubt standard. *United States ex rel. Stachulak* v. *Coughlin,* 520 F.2d 931 (7th Cir. 1975). Inherent in the Seventh Circuit's decision is the recognition that the commitment of sexually dangerous persons can involve even greater deprivations of liberty than juvenile commitments. The sentence imposed under Illinois' commitment law was indeterminate, while a juvenile was only institutionalized until age eighteen.[34]

In the case at Bar, the Texas commitment procedure similarly provides for an indeterminate sentence; thus, the deprivation of liberty is potentially more serious than that faced in juvenile proceedings.[35] The Texas civil commitment statute, which merely requires the state to prove its case by a preponderance of the evidence, rejects this Court's prior reasoning.

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[34] In *People* v. *Burnick,* 535 P.2d 352 (Cal. 1975), the California Supreme Court required the application of a reasonable doubt standard in mentally disordered sexual offender cases. "[S]o drastic an impairment of the liberty and reputation of an individual must be justified by proof beyond a reasonable doubt." *Id.* at 354. *See also People* v. *Pembrock,* 62 Ill. 2d 317, 342 N.E.2d 28 (1976); *In re Andrews,* 334 N.E.2d 15 (Mass. Sup. Jud. Ct. 1975).

[35] [A] former mental patient may suffer from the social opprobrium which attaches to treatment for mental illness and which may have more severe consequences than do the formally imposed disabilities. Many people have an "irrational fear of the mentally ill." The former mental patient is likely to be treated with distrust and even loathing; he may be socially ostracized and victimized by employment and educational discrimination. . . .

The legal and social consequences of commitment constitute the stigma of mental illness, a stigma that could be as socially debilitating as that of a criminal conviction.

Note, *Developments in the Law—Civil Commitment of the Mentally Ill,* 87 Harv. L. Rev. 1190, 1200-01 (1974) (hereinafter cited as Developments in the Law).

3. The Liberty Interest Threatened by Civil Commitment Merits, at a Minimum, the Same Protections Established by the Court in Other Civil Matters Which Require a Standard of Clear and Convincing Evidence. The Court has considered the standard of proof issue in a series of cases concerning United States citizenship and the right to reside in this country. In a 1943 denaturalization case, the Court recognized that requiring proof to meet only a preponderance of the evidence standard leaves too much doubt in the question of whether an individual's citizenship should be revoked. *Schneiderman* v. *United States,* 320 U.S. 118 (1943). Weighing the importance of citizenship to the individual, the Court reasoned that "such a right once conferred should not be taken away without the clearest sort of justification and proof." *Id.* at 122. Thus, the Court imposed a burden of proof which can only be met by "clear, unequivocal and convincing" evidence. *Id.* at 125.

This holding was subsequently expanded to cases involving deportation proceedings. *Woodby* v. *Immigration Service,* 385 U.S. 276 (1966). Recognizing that the degree of proof required "is the kind of question which has traditionally been left to the judiciary to resolve," the Court considered the interests of individuals subject to deportation procedures. *Id.* at 284. While such persons were not facing criminal prosecutions, they were facing the serious deprivation of expulsion from the United States. The Court adopted a standard of clear, unequivocal and convincing evidence,[36] noting that this "standard of proof is no

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[36] The Court has subsequently reiterated this holding in other denaturalization cases. *Chaunt* v. *United States,* 364 U.S. 350 (1960); *Nishikawa* v. *Dulles,* 356 U.S. 129 (1958). In *Chaunt,* the Court reasoned that the grave ramifications to a person's liberty require that naturalization decrees not be lightly set aside. "Clear, unequivocal, and convincing evidence" must be presented which does not leave "the issue in doubt." 364 U.S. at 353.

stranger to the civil law." *Id.* at 285. The Court found that this standard (and even higher standards) had been applied in numerous civil cases involving issues such as civil fraud, adultery, illegitimacy, lost wills and oral contracts to make bequests. With such cases as a counterpoint, the Court reasoned: "[I]t does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case." *Id.*

Finally, in a case involving First Amendment interests, a plurality of the Court held that an extraordinary standard of proof is required in defamation actions. *Rosenbloom* v. *Metromedia,* 403 U.S. 29 (1971). Reasoning that "[i]n libel cases . . . we view an erroneous verdict for the plaintiff as most serious," the Court held that the plaintiff's case must meet a standard of clear and convincing evidence. *Id.* at 50.

This Court, and others, have found a number of diverse interests which cannot be infringed upon by a mere showing of preponderance of the evidence. *Amicus* argues that an individual's interest in liberty is of sufficient import that indefinite civil commitment should not occur unless a higher degree of certainty is shown. Sufficient protection against wrongful commitments cannot be assured unless a more stringent standard of proof is required.

C. The Overwhelming Weight of Authority Favors a Standard of Proof in Civil Commitment Proceedings Which Is More Stringent Than Preponderance of the Evidence.

Numerous federal and state courts have ruled on the question of the appropriate standard of proof in civil commitment hearings. These courts have overwhelmingly rejected preponderance of the evidence, finding this common

"civil" standard to be constitutionally insufficient;[37] however, these courts have differed as to whether the evidence must meet a standard of beyond a reasonable doubt[38] or one of clear and convincing evidence. [39]

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[37] It is clear that the overwhelming trend of the courts considering the standard of proof in civil commitment proceedings . . . is to focus their debate on which of the more stringent standards—proof beyond a reasonable doubt or proof by clear and convincing evidence—is the appropriate one.

Share, *The Standard of Proof in Involuntary Civil Commitment Proceedings,* 1977 Det. Coll. L. Rev. 209, 217 (1977) (hereinafter cited as Share).

[38] Those cases mandating a reasonable doubt standard include: *In re Ballay,* 482 F.2d 648 (D.C. Cir. 1973); *Suzuki* v. *Alba,* 438 F. Supp. 1106 (D. Haw. 1977); *Suzuki* v. *Quisenberry,* 411 F. Supp. 1113 (D. Haw. 1976); *Lessard* v. *Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded,* 414 U.S. 473 (1974), *reinstated,* 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded,* 421 U.S. 957 (1975), *reinstated,* 413 F. Supp. 1318 (E.D. Wis. 1976); *Proctor* v. *Butler,* 380 A.2d 673 (N.H. 1977); *State* v. *O'Neill,* 545 P.2d 97 (Ore. 1976); *In re Hodges,* 325 A.2d 605 (D.C. App. 1974); *Denton* v. *Commonwealth,* 383 S.W.2d 681 (Ky. Ct. App. 1964).

[39] Those cases mandating a standard of clear and convincing evidence include: *French* v. *Blackburn,* 428 F. Supp. 1351 (M.D.N.C. 1977); *Stamus* v. *Leonhardt,* 414 F. Supp. 439 (S.D. Ia. 1976); *Doremus* v. *Farrell,* 407 F. Supp. 509 (D. Neb. 1975); *Bartley* v. *Kremens,* 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded,* 431 U.S. 119 (1977), *redecided, Institutionalized Juveniles* v. *Secretary of Public Welfare,* No. 72-2272 (E.D. Pa. May 25, 1978), *prob. juris. noted,* ..... U.S. ..... (1978); *Lynch* v. *Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974); *Dixon* v. *Attorney General of Commonwealth of Pa.,* 325 F. Supp. 966 (M.D. Pa. 1971); *In re Beverly,* 342 So. 2d 481 (Fla. 1977); *Matter of Valdez,* 88 N.M. 338, 540 P.2d 818 (1975); *Matter of Ward,* 533 P.2d 896 (Utah 1975); *State ex rel. Hawks* v. *Lazaro,* 202 S.E.2d 109 (W. Va. 1974); *In re Levias,* 83 Wash. 2d 253, 517 P.2d 588 (1973) (but construes standard to be civil equivalent of criminal law reasonable doubt standard); *Commonwealth ex rel. Finken* v. *Roop,* 339 A.2d 764 (Pa. Super. 1975); *People* v. *Sansone,* 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974).

Repeatedly, the courts have rejected the preponderance of the evidence standard because of the individual's overriding interest in liberty and because the doctrine of parens patriae is not deemed a sufficient justification for utilizing the less stringent standard.[40] Additionally, the stigma attached to involuntary commitment is a factor relied upon by the courts in rejecting the preponderance standard.[41] The Court's decisions in *Gault, Winship,* and *Woodby* are consistently cited as requiring this result.

The United States Court of Appeals for the District of Columbia carefully analyzed the competing interests in the civil commitment process before concluding that a reason-

[40] *E.g., In re Ballay,* 482 F.2d 648 (D.C. Cir. 1973); *Stamus* v. *Leonhardt,* 414 F. Supp. 439 (S.D. Ia. 1976); *Suzuki* v. *Quisenberry,* 411 F. Supp. 1113 (D. Haw. 1976); *Doremus* v. *Farrell,* 407 F. Supp. 509 (D. Neb. 1975); *Lynch* v. *Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974); *Lessard* v. *Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded,* 414 U.S. 473 (1974), *reinstated,* 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded,* 421 U.S. 957 (1975), *reinstated,* 413 F. Supp. 1318 (E.D. Wis. 1976); *Dixon* v. *Attorney General of Commonwealth of Pa.,* 325 F. Supp. 966 (M.D. Pa. 1971); *Proctor* v. *Butler,* 380 A.2d 673 (N.H. 1977); *Matter of Valdez,* 88 N.M. 338, 540 P.2d 818 (1975); *In re Levias,* 83 Wash. 2d 253, 517 P.2d 588 (1973); *In re Hodges,* 325 A.2d 605 (D.C. App. 1974); *People* v. *Sansone,* 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974).

[41] *E.g., In re Ballay,* 482 F.2d 648 (D.C. Cir. 1973); *Doremus* v. *Farrell,* 407 F. Supp. 509 (D. Neb. 1975); *Lessard* v. *Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded,* 414 U.S. 473 (1974), *reinstated,* 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded,* 421 U.S. 957 (1975), *reinstated,* 413 F. Supp. 1318 (E.D. Wis. 1976); *Proctor* v. *Butler,* 380 A.2d 673 (N.H. 1977). For a discussion of the stigma resulting from former hospitalization, see note 35, *supra.*

able doubt standard is constitutionally required. *In re Ballay,* 482 F.2d 648 (D.C. Cir. 1973). The Court resolved the question within the framework constructed by *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), involving the revocation of parole. There, the two questions addressed by the Supreme Court were: first, whether to apply due process; and, if it were to be applied, what process was due.

Likewise, the *Ballay* court first questioned whether due process should attach in a civil commitment.

> There can no longer be any doubt that the nature of the interests involved when a person sought to be involuntarily committed faces an indeterminate and, consequently, potentially permanent loss of liberty and privacy accompanied by the loss of substantial civil rights . . . is "one within the contemplation of the 'liberty and property' language of the Fourteenth Amendment."

482 F.2d at 655 (citations omitted).

The *Ballay* court then sought to determine the standard of proof required by due process in civil commitment proceedings. The court proceeded by comparing the liberty interests in involuntary commitment with the conditional liberty interest of a parolee. The court reasoned that because a parolee had already been convicted of a crime, the state's interest in institutionalizing him or her was clearly greater than its interest in institutionalizing a mentally ill person, as to whom a threshold deprivation of liberty would occur. From the perspective of the individual, it was reasoned that the mentally ill person has a more substantial expectation of liberty than does the parolee, whose liberty is merely conditional and subject to the limitations of the parole.

While the state's interest in incarcerating criminals includes notions of deterrence, rehabilitation, physical removal from society, and retribution, the *Ballay* court found the state's interest in civil commitment to rest only upon the need to physically remove an individual from society and upon the desire to provide rehabilitation or treatment. Because a criminal can only be physically removed after being convicted of a crime, the court reasoned that the state's interest in physically removing a mentally ill person from society could likewise only be based upon the same standard of proof utilized in criminal proceedings. The *Ballay* court logically concluded that the only justification for a lesser standard of proof could be the state's desire to provide rehabilitation or treatment for the individual.

It is this very rationale which the Texas Supreme Court asserts as support for its decision in the case at Bar. In applying a preponderance standard, the lower court held that the provision of treatment, together with the availability of periodic review and the potential for release when an individual is no longer dangerous, justifies the lesser standard.[42] The *Ballay* court persuasively rebuts this argument. While acknowledging the validity of the state's purpose in treating mentally ill individuals, the *Ballay* court held that the standard of proof must operate to ensure that only those who need treatment are committed. "Recognizing again the immense individual interests involved, it is questionable whether a rather significant margin of error should be tolerated regardless of the rationale." 482 F.2d at 650.

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[42] *See also People* v. *Sansone,* 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974), relying upon full due process protections including, the provision of treatment and periodic review, to justify a clear and convincing standard, rather than a reasonable doubt standard.

Although the Supreme Court has not had occasion to directly address this issue, Chief Justice Burger's concurring opinion in *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975), parallels the reasoning in *Ballay.* In *Donaldson,* the United States Court of Appeals for the Fifth Circuit had applied a quid pro quo theory in upholding the right to treatment for involuntarily committed mental patients. *Donaldson* v. *O'Connor,* 493 F.2d 507, 522-27 (5th Cir. 1974), *vacated and remanded,* 422 U.S. 563 (1975). The Supreme Court indicated concern that such a holding might permit a state to involuntarily hospitalize a mentally ill person upon the mere showing that treatment was contemplated. 422 U.S. 572-73. Justice Burger scrutinized this implication which "raises the gravest of constitutional problems" and which must be "candidly appraised." *Id.* at 585-86 (Burger C.J., concurring).

> Rather than inquiring whether strict standards of proof or periodic redetermination of a patient's condition are required in civil confinement, the theory accepts the absence of such safeguards . . . [T]hat prospect is especially troubling in this area.

Id. at 587.

The previous decisions of this Court concerning the standard of proof in liberty deprivation cases, buttressed by the holdings of lower courts in civil commitment cases, require that the preponderance of the evidence standard be declared a violation of due process.

II.

THE INEXACT NATURE OF THE PSYCHIATRIC TESTIMONY RELIED UPON IN CIVIL COMMITMENT PROCEEDINGS SUPPORTS THE NEED FOR THE EVIDENCE TO MEET A REASONABLE DOUBT STANDARD.

The standard of proof to be met in a civil commitment proceeding can be translated into the degree of statistical probability which must be shown. Under this theoretical construct, the preponderance of the evidence, clear and convincing evidence and reasonable doubt standards would respectively require degrees of probability of 51 percent, 75 percent and 90 percent.[43] The standard of proof issue essentially raises two questions: what degree of probability justifies the curtailment of liberty through civil commitment; and, what degree of probability is realistically achievable. *Amicus* contends that the present state of psychiatric knowledge is insufficient to obtain either 75 percent or 90 percent accuracy in diagnosis or in the prediction of future dangerous behavior. Yet, the primary rationale suggested by the courts for having rejected the reasonable doubt standard and adopting the clear and convincing standard is the impossibility of meeting the higher standard.[44]

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[43] Stone, *supra* note 30, at 56.

[44] *E.g., Doremus* v. *Farrell,* 407 F. Supp. 509 (D. Neb. 1975); *Bartley* v. *Kremens,* 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded,* 431 U.S. 119 (1977), *redecided, Institutionalized Juveniles* v. *Secretary of Public Welfare,* No. 72-2272 (E.D. Pa. May 25, 1978), *prob. juris. noted,* ..... U.S. ..... (1978); *Lynch* v. *Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974); *In re Beverly,* 342 So. 2d 481 (Fla. 1977); *Matter of Valdez,* 88 N.M. 338, 540 P.2d 818 (1975); *State ex rel. Hawks* v. *Lazaro,* 202 S.E.2d 109 (W. Va. 1974); *People* v. *Sansone,* 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974). In *Lynch,* the court viewed the clear and convincing standard as "having the highest degree of certitude reasonably attainable in view of the nature of the matter at issue." 386 F. Supp. at 393.

Amicus argues that the focus of the civil commitment hearing must be shifted to the determination of objective, provable facts—*i.e.,* facets of behavior and overt acts of the individual—upon which a judge or jury can reach a rational decision. Once provable factors are utilized, no reason exists not to apply the reasonable doubt standard when substantial deprivations of liberty are sought.

Over a decade ago Chief Justice Burger recognized that psychiatrists and psychologists "may be claiming too much in relation to what they really understand about the human personality and human behavior."[45] Reliance upon their opinions in civil commitment proceedings can lead to dire results—not the least of which is the wrongful incarceration of human beings.

> The mental condition of one whose mind is so deranged as to require imprisonment for his own and others' good is indeed pitiable. But the mental attitude of one who is falsely found insane and relegated to false imprisonment is beyond conception. No greater cruelty can be committed in the name of the law.[46]

The reasonable doubt standard should not be sacrificed in an attempt to uphold unworkable statutes. Rather, due process especially requires a high standard of proof where the facts at issue are subject to large statistical error.

A. Psychiatrists Cannot Reliably Diagnose Individuals for the Purpose of Determining the Need for Care and Treatment.

The psychiatric diagnosis plays a major role in determining the threshold question in a civil commitment — whether the individual is mentally ill. The psychiatric

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[45] Burger, *Psychiatrists, Lawyers, and the Courts,* 28 Fed. Prob. 37 (1964).

[46] 5 Wigmore on Evidence § 1400 (Chadbourn rev. ed. 1974).

evidence also bears heavily upon the determination of whether an individual is in need of care and treatment.

A key component to the legal sufficiency of psychiatric evidence is the degree of reliability which can be obtained in the diagnostic process. Reliability refers to the "probability or frequency of agreement when two or more independent observers answer the same question."[47] The reliability of the diagnosis establishes the degree of consistency among the opinions of psychiatrists concerning a person's condition.

A recent article which reviewed the available literature on the question of psychiatric reliability concluded: "Studies on psychiatric diagnosis highlight psychiatry's lack of precise definitions and the inability of psychiatrists to apply these definitions in a reliable and consistent manner."[48] Similarly, another reviewer of the relevant literature observed: "With regard to reliability of diagnosis, the most common research findings indicate that, on the average, one cannot expect to find agreement in more than about 60% of cases between two psychiatrists."[49]

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[47] Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 Calif. L. Rev. 693, 697 (1974) (hereinafter cited as Ennis & Litwack).

[48] Albers, Pasewark & Meyer, *Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception,* 6 Cap. U. L. Rev. 11, 15 (1976) (hereinafter cited as Albers, Pasewark & Meyer), and studies cited therein.

[49] Ziskin, Coping With Psychiatric and Psychological Testimony 181 (2nd ed. 1975) (hereinafter cited as Ziskin), and studies cited therein. *See also* Beck, Ward, Mendelson, Mock, & Erbaugh, *Reliability of Psychiatric Diagnosis: A Study of Consistency of Clinical Judgments and Ratings,* 119 Am. J. Psychiat. 351 (1962), cited in Ziskin, *supra,* at 183. "Under relatively optimal conditions, the percentage of agreement among psychiatrists was found to be 54%."

A second concept which must be considered in assessing psychiatric testimony is the validity, or the accuracy, of the judgments which are made.[50] Even 100 percent reliability would reflect nothing about the accuracy of the agreement reached between psychiatrists; all of the psychiatrists agreeing could still be in error in their mutually held conclusions. Validity indicates the likelihood that the diagnosis is correct. When reliability only approaches 60 percent, there can only be agreement between two different psychiatrists in barely more than half of the diagnoses made. Where there is disagreement, at least one professional must be wrong, if not both. Thus, the validity of diagnosis is at least as low as the degree of reliability.[51]

The landmark study conducted by Rosenhan is a classic example of the inability of psychiatrists to accurately determine the threshold existence of mental illness.[52] In that study, eight individuals who were not mentally ill gained admittance to mental hospitals as patients. After becoming patients they acted and behaved normally. Once admitted, they were unable to secure releases from the institutions for periods ranging from seven to fifty-two days, with an average incarceration of nineteen days.[53]

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[50] Ennis & Litwack, *supra* note 47, at 697.

[51] Very few studies of the validity of generalized predictions of the need for care and treatment have been made; however, accuracy appears to be very low. Ennis & Litwack, *supra* note 47, at 718-19. If the psychiatrist predicts that an individual needs care and treatment and hospitalization results, there is no accurate way of testing whether the person could have successfully lived outside of the institution.

[52] Rosenhan, *On Being Sane In Insane Places,* 13 Santa Clara Lawyer 379 (1973).

[53] *Id.* at 383-84.

Rosenhan found that after a label or diagnosis had been applied, facts were construed so as to appear consistent with the label and that the continuing diagnoses were based solely upon a small fraction of the individual's total behavior. Although the pseudo-patients observed the institutional staff to be "people who really cared, who were committed and who were uncommonly intelligent,"[54] Rosenhan concluded: "We have known for a long time diagnoses are often not useful or reliable, but we have nevertheless continued to use them. We now know that we cannot distinguish insanity from sanity."[55]

The purpose of psychiatric diagnosis is to establish guidelines for the description and prediction of an indivdual's behavior which will enable the psychiatrist to properly treat the individual. However, the broad finding of a person's need for care and treatment has little reliability or validity because of the uncertainties of diagnosis. As one commentator concluded, there are few, if any, correlations between diagnosis and behavior, "save perhaps in the grossest kind of psychotic behavior."[56]

B. Psychiatrists Cannot Accurately Predict the Future Dangerousness of Individuals.

The inability of the psychiatric profession to accurately diagnose mental illness, together with growing disenchantment with the concept of parens patriae,[57] has contributed to the trend among courts and legislatures of requiring a finding of dangerousness to justify involuntary commitment.[58] However, *amicus* contends that dangerousness is equally difficult to accurately predict.

The initial obstacle to accurate psychiatric predictions of dangerousness lies in the medical-psychiatric model which rests upon the principle that "judging a sick person well is more to be avoided than judging a well person sick."[59] In diagnosing a patient, the risks which a psychiatrist takes are greatly reduced by predicting dangerousness and recommending institutionalization.[60] If the prediction is in error, it will likely never be discovered because the individual is incarcerated; on the other hand, should the psychiatrist err by releasing a dangerous individual, he or she will surely learn of the error if an incident occurs in the community.[61]

Even assuming an inachievably high degree of accuracy in psychiatric predictions of future dangerousness, the results of relying upon such a model are startling.

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[54] *Id.* at 339.

[55] *Id.* at 397.

[56] Frank, *Psychiatric Diagnosis: A Review of Research,* 81 J. Gen. Psychol. 157, 165 (1969).

[57] *E.g.,* cases cited in note 40, *supra.*

[58] Even where a finding of dangerousness is not specifically required, it is usually a key factor in a judicial decision to order commitment. Kumasaka & Gupta, *Lawyers and Psychiatrists in the Court: Issues on Civil Commitment,* XXXII Md. L. Rev. 6, 10-12 (1972).

[59] Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions,* 23 J. Leg. Educ. 24, 46-47 (1970) (hereinafter cited as Dershowitz).

[60] Peterson & Seo, *Bayesian Analysis of Overprediction of Insanity,* 34 Psychol. Rep. 207 (1974).

[61] "The losses [to the psychiatrist] due to errors of prediction are such that psychiatrists will want to overpredict violent behavior. Overprediction is perfectly rational for a risk-averting psychiatrist." *Id.* at 213.

> Assume that one person out of a thousand will kill. Assume that an exceptionally accurate test is created which differentiates with ninety-five percent effectiveness those who will kill from those who will not. If 100,000 people are tested, out of the 100 who would kill, 95 would be isolated. Unfortunately, out of the 99,900 who would not kill, 4,995 people would also be isolated as potential killers. In these circumstances, it is clear that we could not justify incarcerating all 5,090 people.[62]

In reality, however, psychiatrists cannot accurately predict future dangerousness. Study after study has concluded that psychiatrists overpredict dangerousness and have no ability to accurately predict future dangerousness.

> [P]sychiatrists are rather inaccurate predictors; inaccurate in an absolute sense, and even less accurate when compared with other professionals . . . and when compared to actuarial devices, such as prediction or experience tables. Even more significant for legal purposes: it seems that psychiatrists are particularly prone to one type of error—overprediction. In other words, they tend to predict anti-social conduct in many instances where it would not, in fact, occur. Indeed, our research suggests that for every correct psychiatric prediction of violence, there are numerous erroneous predictions.[63]

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[62] Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. Pa. L. Rev. 75, 84 (1968) (hereinafter cited as Livermore).

[63] Dershowitz, *supra* note 59, at 46. One eminent psychiatrist observed:

> I know of no reports in the scientific literature which are supported by valid clinical experience and statistical evidence that describe psychological or physical signs or symptoms which can be reliably used to discriminate between the potentially dangerous and the harmless individual.

Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. Pa.

(footnote continued)

After his years as a jurist with a deep involvement in legal issues affecting mentally ill individuals, Judge Bazelon has adeptly summarized the need for a reasonable doubt standard in civil commitments.

> Recent studies indicate that the accuracy of predictions of future dangerousness is less—far less, to put it mildly—than the requirement of "beyond a reasonable doubt" which is our legal standard to justify criminal confinement. Indeed, to accept commitments on the basis of present predictions of dangerousness, we must virtually reverse Blackstone's immortal formulation of the presumption of innocence: instead of freeing nine guilty persons to avoid convicting one innocent person, we must confine nine non-dangerous persons to avoid freeing one dangerous person.[64]

(footnote continued)

L. Rev. 439, 444 (1974) (hereinafter cited as Diamond). *See also* Steadman, *Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry*, 1 J. Psychiat. and Law 409, 423-24 (1973).

> The lack of meaningful differentiation and the questionable bases for dangerousness presented in the determinations studied here do lead to serious doubts about the appropriateness of any psychiatric predictions of dangerousness for involuntary mental hospitalization . . . . Our conclusion is exactly that of the Pennsylvania Task Force to revise that state's mental health/retardation law which concluded that ". . . there is insufficient predictive expertise to justify preventive detention . . ." based on predictions of dangerousness in the mentally ill.

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[64] Bazelon, *Institutionalization, Deinstitutionalization and the Adversary Process*, 75 Colum. L. Rev. 897, 899-900 (1975) (hereinafter cited as Bazelon). The logical extention of the query then becomes:

> If in the criminal law, it is better that ten guilty men go free than that one innocent man suffer, how can we say in the civil commitment area that it is better that fifty-four harmless people be incarcerated lest one dangerous man be free?

Livermore, *supra* note 62, at 84.

Further evidence of the unrealiability of psychiatric diagnosis has been garnered as a result of the Court's landmark decision in *Baxstrom* v. *Herold*, 383 U.S. 107 (1966). There, the Court struck down on equal protection grounds a procedure whereby prisoners, upon completion of their penal sentences, were automatically confined for compulsory treatment as dangerous mentally ill persons, without a jury trial or a judicial determination. The Court's decision resulted in the release of large numbers of former prisoners from confinement in maximum security treatment centers where they had been confined because of psychiatric predictions of their dangerousness.[65] All were initially transferred to civil hospitals with no special security measures,[66] and many were subsequently discharged.

An exhaustive follow-up study was conducted on the Baxstrom population. After several years, the results showed that of the 969 Baxstrom patients,[67] 27 percent were then living in the community, nine individuals had subsequently been convicted of crimes (only two had been convicted of felonies), and three percent were incarcerated in correctional facilities or hospitals for the criminally in-

[65] Hunt & Wiley, *Operation Baxstrom After One Year*, 124 Am. J. Psychiat. 974, 977 (1968). "Most of them had been examined at least once—often several times—by experienced psychiatrists from the Department of Mental Hygiene and had been denied transfer on the grounds that they were too disturbed or potentially dangerous."

[66] *Id.* at 975-76. Although numerous officials believed that a large number of patients were too dangerous to be maintained in civil hospitals, only seven proved to be so difficult to manage as to require a transfer to a maximum security hospital within the first year of Operation Baxstrom.

[67] *Id.* at 976. Of this number, 176 patients had been discharged after one year.

sane; the level of dangerous behavior exhibited by this group, the members of which had been uniformly considered dangerous, was surprisingly low.[68]

The Baxstrom studies reaffirm the conclusion that psychiatrists are inaccurate predictors of dangerousness, whose tendency is to overpredict.

> In statistical terms, Operation Baxstrom tells us that psychiatric predictions of dangerous behavior are incredibly inaccurate. In human terms, it tells us that but for a Supreme Court decision, nearly 1,000 human beings would have lived much of their lives behind bars . . . all because a few psychiatrists, in their considered opinion, thought they were dangerous and no one asked for proof.[69]

[68] Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-70*, 129 Am. J. Psychia. 304, 308-09 (1972).

Even the few studies published since Operation Baxstrom which claim that dangerousness can be reliably diagnosed do not present a high degree of predictability. Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 Rutgers L. Rev. 1084, 1092 (1976) (hereinafter cited as Cocozza & Steadman). In one such study only a false positive rate of 65 percent was achieved; in other words, 35 percent of the predictions of dangerousness were correct, while 65 percent of the predictions of dangerousness were incorrect. Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 Crime & Delinq. 371 (1972) (hereinafter cited as Kozol, Boucher & Garofalo). This study involved 592 criminal offenders during a five year period after their release. These individuals had committed prior dangerous acts, and most of them were former sex offenders—a group for which high predictive results are anticipated.

[69] Ennis, *The Rights of Mental Patients*, in The Rights of Americans 487 (Dorsen ed. 1970).

Subsequent to Operation Baxstrom, Cocozza and Steadman undertook a new study, based upon an amendment to the New York Criminal Procedure Law.[70] The new law mandated a determination of dangerousness for all indicted felony defendants found incompetent to stand trial. The determination was to be made by a judge after considering the opinions of two psychiatrists. Those found dangerous were placed in a Department of Corrections facility; those found non-dangerous were placed in a Department of Mental Hygiene mental hospital. The two institutions were in close physical proximity, and they were operated in similar manners. "Thus, the two study groups were, for all intents and purposes, in the same facility . . . and experienced very similar lengths of hospitalization prior to their release to the community or return to court."[71]

Upon completion of the study of these two incarcerated populations, the researchers concluded: "Our results showed that the patients evaluated as dangerous by the psychiatrists were not more dangerous than those evaluated as nondangerous."[72] In fact, among those individuals from both groups who were later returned to the community, 14 percent of those previously diagnosed as dangerous were subsequently arrested for a violent crime, while 16 percent of those previously diagnosed as not dangerous were subsequently arrested for a violent crime.[73]

Based upon the overwhelming evidence, a Task Force of the American Psychiatric Association has concluded that

[70] Cocozza & Steadman, *supra* note 68, at 1092. The amendment became effective on September 1, 1971.

[71] *Id.* at 1097.

[72] *Id.*

[73] *Id.* at 1098. Viewing their study as producing the "most definite evidence available," the researchers assert: "On the basis of all these indicators, we conclude that the psychiatric predictions of dangerousness were not at all accurate." *Id.*

psychiatrists have no special expertise in predicting future dangerous behavior.

> It has been noted that "dangerousness" is neither a psychiatric nor a medical diagnosis, but involves issues of legal judgment and definition, as well as issues of social policy. Psychiatric expertise in the prediction of "dangerousness" is not established and clinicians should avoid "conclusory" judgments in this regard.[74]

C. The Reasonable Doubt Standard Should Not Be Compromised Because of Inexact Elements of Proof.

Because of the difficulties which psychiatrists encounter in attempting to accurately diagnose mental illness and predict future dangerous behavior, it is constitutionally imperative that a high standard of proof be required. The poor predictive abilities of psychiatrists cannot justify lowering the standard of proof when fundamental personal liberty is at issue. *Amicus* suggests that a more viable solution to the standard of proof issue would be to require that the facts to be proved be of such a nature that the reasonable doubt standard can be realistically met.

Numerous commentators have suggested that, should a civil commitment system exist, its objectives should be jus-

[74] American Psychiatric Association, Clinical Aspects of the Violent Individual, Task Force Report 8, at 33 (1974). The Alcohol, Drug Abuse, and Mental Health Administration of the Department of Health, Education and Welfare has reached a similar conclusion. "Although the psychiatric profession is frequently called upon to predict the potential dangerousness of persons brought before the courts, no scientifically reliable method for predicting dangerous behavior exists." Diamond, *supra* note 63, at 451-52, citing United States Department of Health, Education, and Welfare, *HEW News* (News Release, Aug. 8, 1974).

tified by specific behavior of an individual—*i.e.*, recent overt acts of a dangerous nature.

> [I]f there is to be civil commitment, there is no legitimate basis for civil commitment other than recent overt acts, attempts, or threats of overt acts. Any other bases for commitment necessarily involves judgments and predictions which psychiatrists are unable to make reliably and accurately.[75]

The plea to require overt acts as an element of proof in civil commitment proceedings is especially attractive because the legal process would no longer be incarcerating those individuals as to whom the predictions of dangerousness are the least reliable.

> The difficulty involved in predicting dangerousness is immeasurably increased when the subject has *never actually performed an assaultive act.* . . . No one can predict dangerous behavior in an individual with *no history of dangerous acting out.* [76]

Numerous lower courts have dealt with the demands of due process in civil commitments by requiring proof of a

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[75] Ennis & Litwack, *supra* note 47, at 745 n. 182. *See generally* Developments in the Law, *supra* note 35, at 1301-02.

[76] Kozol, Boucher & Garofalo, *supra* note 68, at 384 (emphasis added). *See also* Rubin, *Prediction of Dangerousness in Mentally Ill Criminals,* 27 Arch. Gen. Psych. 397, 405 (1972); Developments in the Law, *supra* note 35, at 1243-45, and studies cited therein. Judge Bazelon argues that a person who has committed numerous anti-social acts is much more likely to commit another such act than an individual who has generally conformed to societal expectations. Bazelon, *supra* note 64, at 901.

specific overt act.[77] In an analogous situation, the Court rejected a vagueness challenge to a sexual psychopath law because the Minnesota Supreme Court's construction of the statute required the matter to be definitely proved. *Minnesota ex rel. Pearson* v. *Probate Court,* 309 U.S. 270 (1940).[78]

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[77] *Goldy* v. *Beal,* 429 F. Supp. 640 (M.D. Pa. 1976); *Stamus* v. *Leonhardt,* 414 F. Supp. 439 (S.D. Ia. 1976); *Doremus* v. *Farrell,* 407 F. Supp. 509 (D. Neb. 1975); *Lynch* v. *Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974); *Bell* v. *Wayne County Hospital,* 384 F. Supp. 1085 (E.D. Mich. 1974); *Lessard* v. *Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded,* 414 U.S. 473 (1974), *reinstated,* 379 F. Supp. 1376 (1974), *remanded,* 421 U.S. 957 (1975), *reinstated,* 413 F. Supp. 1318 (E.D. Wis. 1976); *Dixon* v. *Attorney General of Commonwealth of Pa.,* 325 F. Supp. 966 (M.D. Pa. 1971). In *Suzuki* v. *Alba,* 438 F. Supp. 1106 (D. Haw. 1977), the Hawaii commitment statute which had been amended as a result of *Suzuki* v. *Quisenberry,* 411 F. Supp. 1113 (D. Haw. 1976), was again found to be deficient "because it fails to require the finding of a recent act, attempt or threat of imminent and substantial danger before commitment may occur." 438 F. Supp. at 1110. *But see United States ex rel. Mathew* v. *Nelson,* No. 72 C 2104 (N.D. Ill. April 13, 1978).

[78] The state court's interpretation called for factual evidence of conduct "pointing to probable consequences [which is] as susceptible of proof as many of the criteria constantly applied in prosecutions for crime." 309 U.S. at 274.

In a recent decision requiring a reasonable doubt standard, the New Hampshire Supreme Court reasoned that the inexactitude of psychiatric medicine demands compliance with a reasonable doubt standard in order to protect all members of society in their pursuit of a fundamental interest. *Proctor* v. *Butler,* 380 A.2d 673 (N.H. 1977). The Court concluded that such a standard is workable. "It is not difficult to conceive of circumstances in which evidence of past conduct and mental disability will convince 'beyond a reasonable doubt' of a potentially serious likelihood of dangerousness." *Id.* at 677.

When that which is sought to be proved is actually subject to reliable proof, the reasonable doubt standard must be required. The Texas statute being considered in the case at Bar does not require elements of proof which are susceptible to even reliable speculation.[79] The individual's substantial liberty interest mandates a reasonable doubt standard of proof in civil commitments. This Court should not permit a lower standard to be applied solely because state legislatures have drafted statutes which are vague and not easily susceptible to traditional notions of proof. The standard of proof should not be weakened merely because the evidence is weak.

III.

THE IMPLICATIONS OF THIS COURT'S DECISION WILL BE FAR-REACHING, AFFECTING NOT ONLY MENTALLY ILL PERSONS BUT ALSO OTHER HANDICAPPED INDIVIDUALS BY ESTABLISHING THE EXTENT OF CONSTITUTIONAL CONSTRAINTS REQUIRED IN THE CIVIL COMMITMENT PROCESS.

The standard of proof ordered by this Court will have a lasting effect upon the nature of civil commitment proceedings. The standard of proof applied will influence decisions concerning who is committed, will define the level of

[79] The problem with applying any standard of proof to vague criteria is well addressed by Dr. Stone in his reaction to the *Lessard* decision. "But when we add proof beyond a reasonable doubt as a standard for the vague criteria used in other jurisdictions we have simply multiplied 95 x 0." Stone, *supra* note 30, at 57. *See also Murel* v. *Balt. City Crim. Cts.*, 407 U.S. 355 (1972) (Douglas J., dissenting). "Proving a state of mind is no more difficult than many other issues with which courts and juries grapple each day." *Id.* at 364.

seriousness which should attach to the entire commitment proceeding, and will impact upon the burgeoning movement of handicapped individuals who seek integration into society's mainstream.

A. The Standard of Proof in a Civil Commitment Proceeding Has a Substantial Effect Upon the Ultimate Determination of the Trier of Fact.

As previously discussed, virtually all of the courts considering the issue have held that preponderance of the evidence is an insufficient standard to justify the deprivation of liberty which occurs in involuntary hospitalization.[80] Not yet authoritatively resolved is the question of whether a standard of clear and convincing evidence or one of reasonable doubt should be mandated. In reaching this decision, the Court should consider the confusion surrounding the clear and convincing standard, which has been interpreted differently in various states.[81]

The Texas Supreme Court equates a clear and convincing standard with a restatement of the preponderance of the evidence standard under Texas law. *State* v. *Turner*, 556 S.W.2d 563 (Tex. 1977). On the other hand, the Washington Supreme Court equates the clear and convincing

[80] *See generally* Part I C, *supra*, particularly notes 37-39.

[81] The Supreme Court has never formulated a specific definition of the clear and convincing standard of proof. In *Klapprott* v. *United States*, 335 U.S. 601, 612 (1949), Justice Black equated the standard with the reasonable doubt standard in criminal cases. *Accord Id.* at 617 (Rutledge J., concurring). However, in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 737 (1966), the standard was viewed as more stringent than the preponderance standard but not as stringent as the reasonable doubt standard. For a discussion of the various interpretations, see Share, *supra* note 37, at 238-39.

standard with the reasonable doubt standard required in criminal proceedings.

> [Our] ruling . . . is consistent with the Supreme Court holding in *Winship* in demanding that the state establish its case under a standard of proof which constitutes the civil counterpart of the criminal reasonable doubt standard, to wit: clear, cogent, and convincing evidence. Carrying a much greater and much stricter burden of proof than a mere preponderance of the evidence . . . the clear, cogent, and convincing test applicable in mental illness proceedings exacts the duty that every element essential to proving committable mental illness be demonstrated to a degree essentially corresponding to that necessary for commitment in criminal proceedings.

In re Levias, 83 Wash. 2d 253, 517 P.2d 588, 590 (1973).

The Court has previously rejected the theory that the standard of proof makes little or no difference to the trier of fact. "[W]e reject the Court of Appeals' suggestion that there is, in any event, only a 'tenuous difference' between the reasonable doubt and preponderance standard. The suggestion is singularly unpersuasive." *In re Winship*, 397 U.S. 358, 367 (1970). Legal commentors concur.

> The reasonable doubt standard impresses on the trier of fact the necessity of reaching a subjective state of certitude of the fact in issue; the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.[82]

[82] Dorsen & Rezneck, *In re Gault and the Future of Juvenile Law*, 1 Fam. L. Q. 1, 26-27 (Dec. 1967). *See also Murel* v. *Balt. City Crim. Cts.*, 407 U.S. 355, 358 (1972) (Douglas J., dissenting); Wexler, Scoville, et al., *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 Ariz. L. Rev. 1, 101-17 (1971) (hereinafter cited as Wexler).

The standard of proof will make an important difference—the higher the standard, the greater the protection given to the individual's liberty interests.

B. The Application of a Strict Standard of Proof Will Elevate the Commitment Process to a Level Consonant With the Nature of the Liberty Interests at Stake.

Historically the civil commitment process was conducted informally, with a view toward administrative convenience. The serious loss of liberty to the individual was seen as subordinate to the parens patriae interest of the state. However, an increasing number of courts are now carefully scrutinizing the commitment system. As a result of decisions similar in intent to this Court's pronouncements with regard to the juvenile justice system, increasing doses of due process are being prescribed for the ailing civil commitment process.

Despite the growing number of courts which have ordered strict due process safeguards,[83] an aura continues to surround commitment proceedings which subverts the seriousness of the process.[84] All too frequently, hearings last

[83] *E.g., In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *Suzuki* v. *Quisenberry*, 411 F. Supp. 1113 (D. Haw. 1976); *Lessard* v. *Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded*, 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976).

[84] One graphic illustration is found in *State ex rel. Memmel* v. *Mundy*, No. 441-417 (Cir. Ct. Wis. August 8, 1976), *appealed on other grounds*, 75 Wis. 2d 276, 249 N.W.2d 573 (1977), reported in 1 Mental Dis. L. Rep. 183 (1976). The Milwaukee Circuit Court ordered that a number of persons previously committed be either released or given rehearings because of inadequacies in the original

(footnote continued)

but a few minutes and the testimony of the psychiatrist is accepted without question. "The cursory manner in which commitment proceedings are conducted in many states makes the court merely an acquiescent partner to already formulated psychiatric decisions."[85] Similarly, the courts

(footnote continued)

hearings. The decision affected 827 of 838 applications for commitment heard during the period from January 1, 1975 to April 1, 1976. In a scathing decision aimed at both lawyers and judges, the court stated:

> The record presented by this case is as bleak a picture as has probably ever been presented of justice in Milwaukee County. A massive and systematic deprivation of the constitutional rights of people who are unable to voice their own protests has been accomplished by the cooperation of bench and bar of Milwaukee County. It is unconscionable that lawyers and judges who are trained in the law and who have a special duty to protect the constitutional rights of those who are unable to protect themselves, could participate in such a scheme to bilk citizens of their constitutional rights.
>
> [T]he onus of this debacle lies squarely with the lawyers and judges who operate this greased runway to the County Mental Health Center.

Id.

[85] Albers, Pasewark & Meyer, *supra* note 48, at 32-33, citing: Albers & Pasewark, *Involuntary Hospitalization: Surrender at the Courthouse*, Am. J. Comm. Psych. 288 (1974) (study of 300 consecutive commitment cases revealed the court concurring with the two psychiatric examiners in 295 of the cases; a sample of 21 cases illustrated mean and median hearing times of 9.2 and 8.0 minutes, respectively); Miller & Schwartz, *County Lunacy Commission Hearings: Some Observations of Commitment to a State Mental Hospital*, 14 Social Prob. 26 (1966) (mean time for hearings was 3.8 minutes); Scheff, *The Societal Reaction to Deviance: Ascriptive Elements in the Psychiatric Screening of Mental Patients in a Midwestern State*, 11 Social Prob. 401 (1964) (hearings lasting 9.2 minutes on the average); Wilde, *Decision Making in a Psychiatric Screening Agency*,

(footnote continued)

have been characterized as "all too willing to accept the therapist's mimeographed affidavit stating the conditions have been met, without independently testing the validity of the attestation."[86]

The case at Bar provides this Court with the opportunity to mandate an appropriate level of formality to such hearings, consistent with the seriousness of the issue to be determined. Regardless of the existence of other procedural or substantive deficiencies, a reasonable doubt standard puts the trier of fact on notice that the commitment proceeding involves more significant issues than many routine civil matters. This strict standard would publish a message to society and to state legislatures—civil commitment can no longer be used haphazardly as a convenient tool to remove from society those of us who are deemed to be different, strange or bothersome. Rather, the reasonable doubt standard will infuse the involuntary commitment process with a sense of dignity and seriousness of purpose. Our system of laws permits no other judicial proceeding to be conducted in such a trivial and informal manner when such immense individual interests are at stake.

(footnote continued)

8 J. Health & Soc. Behavior 215 (1968) (hearings lasting 8.3 minutes on the average). *See* also Luby & Morris, *Civil Commitment in a Suburban County: An Investigation by Law Students*, 13 Santa Clara Lawyer 518 (1973); Wexler, *supra* note 82, at 38-42; Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 Tex. L. Rev. 424 (1966).

In recent periodic review hearings for recommitment of mentally retarded persons in West Virginia, 198 hearings were held at Colin Anderson Training Center within two days, with each hearing lasting no more than three to five minutes and resulting in 196 individuals being recommitted involuntarily. Sunday Gazette Mail, Charleston, West Virginia, page 1E (May 7, 1978).

[86] Kittrie, *supra* note 1, at 370.

C. Unless a Strict Standard of Proof is Required, Numerous Other Classes of Handicapped Persons, Who Have Only Recently Defeated the Social Impulse Toward Institutionalization and Redirected Public Concern Toward Community Care and Integration, Will Once Again Be Threatened With Involuntary Commitment to Institutions.

Mentally ill individuals are not the only category of persons subject to the involuntary commitment process. Individuals with mental retardation, epilepsy and physical handicaps such as cerebral palsy have historically been institutionalized.[87] This Court's determination in the case at Bar will influence the development of substantive and procedural safeguards in commitment hearings involving a wide range of handicapped individuals.

It has only been during the past decade that the institutionalization movement has been reversed. This shift has occurred for several reasons. First, a shift in philosophy by experts in the field of developmental disabilities has resulted in the application of the principles of normalization and the developmental model.[88] Additionally, the federal government has recognized the need to maintain persons in the community and has passed legislation aimed at the provision of community services.[89]

[87] *See generally* Commission For the Control of Epilepsy and Its Consequences, The Plan For Nationwide Action on Epilepsy (1977) (on epilepsy); Kugel, *Introduction*, in President's Committee on Mental Retardation, Changing Patterns in Residential Services For the Mentally Retarded 3, 5 (rev. ed. 1976) (on mental retardation, cerebral palsy and other physical disabilities); Blatt, Souls in Extremis: An Anthology on Victims and Victimizers (1973) (on mental retardation).

[88] *See generally* Menolascino, Challenges in Mental Retardation (1977); President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded (rev. ed. 1976); Wolfensberger, The Principle of Normalization in Human Services (1972).

Finally, increasing judicial intervention has resulted in fewer persons being involuntarily hospitalized and growing numbers being provided with community-based placement alternatives.[90] While some courts have accomplished their purpose through procedural safeguards which make institutionalization more difficult, one court has recently ruled that confinement of mentally retarded individuals in a massive, isolated institution is unconstitutional,[91] ordering closure of the facility.[92]

[89] The Developmental Disabilities Assistance and Bill of Rights Act requires that treatment services and habilitation for persons with developmental disabilities be provided "in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. § 6010. *See generally* notes 26-29, *supra*, and accompanying text.

[90] For civil commitment cases, see note 83, *supra*. Cases decided on right to treatment, least restrictive alternative and right to protection from harm theories include: *Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *New York State Association for Retarded Children & Parisi* v. *Carey*, 357 F. Supp. 752 (E.D.N.Y. 1973) and 393 F. Supp. 715 (E.D.N.Y. 1975); *Horacek* v. *Exon*, 352 F. Supp. 71 (D. Neb. 1973) and No. 72-6-299 (D. Neb. 1975); *Wyatt* v. *Stickney*, 344 F. Supp. 387 M.D. Ala. 1972), *aff'd sub. nom., Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

[91] *Halderman* v. *Pennhurst State School and Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977).

[92] *Halderman* v. *Pennhurst State School and Hospital*, No. 74-1345 (E.D. Pa. March 17, 1978), ordering the Commonwealth and county defendants "to provide suitable community living arrangements for the retarded of Pennhurst."

An emerging trend in social policy is permitting handicapped people to enjoy the opportunity to live full and meaningful lives in the mainstream of community life. Only in the recent past has society begun to recognize that handicapped individuals have the same rights and needs as other people. This evolving social model is an immense triumph for basic human rights and dignity.

Involuntary civil commitment and institutionalization are statues to a time when handicapped people were systematically confined and forgotten. These processes must be accountable for the severe curtailments of liberty which they seek to impose. Only a reasonable doubt standard of proof can insure that individuals are not incarcerated for ambiguous deviations from an arbitrary norm.

CONCLUSION

For the reasons discussed in this brief, *amicus* respectfully requests this Court to reverse the decision of the Supreme Court of Texas and hold that a "beyond a reasonable doubt" standard of proof is constitutionally required in involuntary civil commitment hearings.

Respectfully submitted,

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